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EX PARTE

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147**

Dear Ms. Dortch:

As part of its triennial review proceeding, it is anticipated that the Commission will resolve a number of issues related to the unbundling of so-called "high-capacity" loops,[1] interoffice transport facilities, and loop-transport combinations (a.k.a. "EELs"). In this letter, WorldCom demonstrates that there is no credible predicate for several of the arguments made in this proceeding by the Bell Operating Companies (BOCs). We also present a disaggregated comparison of special access and unbundled network element (UNE) pricing in 5 states. This analysis shows that the BOCs have priced special access in such a manner that the preponderance of the difference between special access prices and the BOCs' forward-looking costs, is concentrated in mileage charges. The BOCs' special access pricing behavior has profound implications for the decisions that the Commission must make.

## I. Competitive fiber nodes are limited to a minority of ILEC wire centers and a minuscule number of commercial buildings where there is demand for high-capacity circuits.

The BOCs offer several arguments for why high-capacity loops, interoffice transport facilities, and EELs should not be unbundled. First, they say that competitive deployment of alternative facilities is rampant. This assertion, as well as each of the "facts" presented to support it, is plainly false.

[1] In this proceeding, carriers have generally described high-capacity circuits as those of DS1 or greater bandwidth.

### A. CLECs depend on ILEC last-mile facilities.

Verizon recently repeated the absurd claim that competitive local exchange carriers (CLECs) use their own last-mile facilities to serve the vast majority of their business customers. The only evidence for this remarkable assertion appears in the most recent version of the so-called "Fact Report."[2] Therein, BOC lawyers reasoned that after subtracting the number of high-capacity UNEs that CLECs have ordered from an estimate of the number of self-switched business lines that CLECs provide, the residual would represent the number of customers that CLECs serve over their own last-mile facilities.[3] Somehow they ignored the actual fact that CLECs depend on BOC-provided special access services to reach the vast majority of their customers. In other words, they count as CLEC facilities facilities purchased from the incumbent local exchange carriers (ILECs) off their special access tariffs.

The BOCs' omission of data, which are entirely within their possession, on the number of DS1 and DS3 tails sold to CLECs as special access services, is telling. It is also troubling in light of the BOCs' continuing efforts to force CLECs to purchase special access instead of high-capacity UNEs.[4]

Despite withholding information on the number of special access tails sold to CLECs, the BOCs recently asserted that "there is no reason to believe that the number of [special access lines] accounts for a significant fraction of the total CLEC self-supplied loops reported in the Fact Report."[5] In fact, there is every reason to believe that CLECs depend on ILEC special access to reach most of the buildings where they provide high-capacity services. On April 4, 2002, WorldCom submitted a confidential ex parte in which it demonstrated that buildings lit by competitive networks accounted for only a very small percentage of the buildings where WorldCom provides service.[6] Indeed, WorldCom, which operates one of the most extensive CLEC networks, provisions approximately 90% of its last-mile DS1s over ILEC special access facilities.

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[2] UNE Fact Report 2002, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, CC Docket No. 01-338.

[3] *Id.* at section IV-A-1, Table 1.

[4] The BOCs themselves have adopted use and commingling restrictions, which have made it all but impossible for CLECs to utilize EELs. Verizon notoriously refuses to provide CLECs even with high-capacity loops. Indeed, Verizon has recently refuse to provide WorldCom with thousands of unbundled high-capacity loops based on restrictions that are allegedly found in its special access tariffs (sic).

[5] UNE Rebuttal Report 2002, attached to ex parte letter from Dee May to Marlene H. Dortch, filed on behalf of Verizon, Qwest, SBC, and BellSouth on October 23, 2002.

[6] Declaration of Peter H. Reynolds at ¶ 7 (attachment to April 4, 2002 letter from Henry G. Hultquist, WorldCom, to William F. Caton).

The BOCs have also claimed that CLEC fiber networks reach several hundred thousand commercial office buildings nationwide.[7] This is plainly false. WorldCom's experience as a purchaser of CLEC last-mile facilities shows that CLECs have lit no more than 30,000 buildings including WorldCom's own fiber deployment.[8] The BOCs' inflated estimates, which are drawn from third-party sources, not real market experience, must be disregarded.[9]

WorldCom recently extended this testimony with an analysis of CLEC penetration in the most competitive service areas in the country. For the top 26 MSAs, WorldCom identified wire centers where competitive providers had deployed their own fiber facilities. Within these areas, WorldCom alone relies on the ILECs to reach 81,815 discrete building addresses. Yet competitive providers have lit only 8,805 buildings in the same areas. Thus, even in those areas where competitive fiber deployment is most extensive, alternative facilities reach no more than 11% of the buildings where there is demand for high-capacity circuits.[10]

### B. Existing competitive fiber deployment does not show that CLECs would not be impaired if denied access to ILEC loop and transport facilities.

The BOCs continue to tout estimates of competitive fiber route miles as evidence of robust competition. The BOCs claim that competitive carriers have deployed at least 184,000 fiber route miles.[11] While it is noteworthy that the BOCs now concede that this number includes long-haul fiber,[12] these route-mile estimates are far less useful to assessing competitive alternatives than the BOCs pretend.

As a legal matter, the U.S. Court of Appeals for the D.C. Circuit has instructed the Commission to undertake a more granular investigation of competitive entry.[13] For

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[7] According to SBC, the number is 380,000 (*see* ex parte letter of October 21, 2002 from Jay Bennett to Marlene H. Dortch, attached presentation at 10). Verizon counts 175,000 such buildings (*see* ex parte letter of October 9, 2002 from W. Scott Randolph to Marlene H. Dortch, attached presentation at 11). And the "UNE Rebuttal Report 2002," submitted by all four of the BOCs concedes that the correct number is 30,000.

[8] As noted above, the UNE Rebuttal Report does not dispute this estimate.

[9] Once again, data the BOCs may have withheld would prove far more revealing than those they have submitted. It is highly likely that the BOCs have compiled internal data on the number of buildings to which their competitors have deployed fiber. For whatever reason, they have consistently chosen to withhold their own competitive analyses and have relied instead on third-party and media sources for their alleged "facts."

[10] The actual percentage is probably much lower. The total number of buildings in these areas reached by ILEC facilities is undoubtedly larger than 81,815.

[11] UNE Fact Report 2002 at section III-6.

[12] UNE Rebuttal Report 2002 at section III-B.

[13] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 425-426 (2002).

purposes of such an inquiry, nationwide statistics regarding fiber route miles, including long-haul routes, are irrelevant.[14]

Moreover, these statistics, by themselves, conceal far more useful information than they reveal. First, they include duplicate route miles. For example, if three competitive carriers each have fifty miles of fiber-optic cable in the exact same route configuration, the BOCs count this as 150 route-miles of competitive fiber. This kind of gross over-counting will infect any non-granular examination of fiber deployment.

Second, the BOCs conveniently ignore the fact that much of the value of a fiber network lies not in the total number of route miles, but rather in the number of nodes that are lit on that network.[15] The actual information that is in the record on lit fiber nodes is devastating to the BOCs' case. For example, the New York Public Service Commission undertook an investigation into the fiber networks of Verizon and its competitors in LATA 132, perhaps the most competitive area in the country. The New York PSC found that Verizon's fiber network extends to seven times as many buildings as the networks of all its competitors combined.[16] It is noteworthy that New York's findings actually understate Verizon's dominance, since Verizon also reaches a large number of buildings by copper facilities over which it can provide high-capacity services.

### C. A granular analysis of transport impairment must focus on relevant competitive alternatives.

As BellSouth and SBC appear to recognize, any granular analysis of transport competition must look at the presence of alternative fiber providers in particular wire centers.[17] On this point, even the BOCs' "Fact Report" is clear: 86% of BOC wire centers are not served by any competitive transport; only 4% of BOC wire centers are served by three or more competitors.[18]

BellSouth attempts to escape the implications of their own facts by advising the Commission that it can safely eliminate unbundling whenever there are 3 or more competitive providers in the wire center on *either* end of a transport route. That is an irrational standard. In order to compete with BellSouth's interoffice transport facilities, WorldCom or any other CLEC must be collocated in the wire center in which the end

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[14] Of course, the BOCs do not truly want the Commission to engage in a granular analysis of impairment, but would prefer to have the Commission make nationwide rules based on the highly aggregated data presented in their "Fact Report."

[15] A node is a location on a network where service can be provided. These include, for example, lit buildings, collocation arrangements, IXC POPs, cell towers, etc.

[16] New York Public Service Commission, Opinion and Order Modifying Special Services Guidelines for Verizon New York Inc., Conforming Tariff, and Requiring Additional Performance Reporting, Case Nos. 00-C-2051, 92-C-0665 (June 15, 2001) at 7.

[17] *See, e.g.*, ex parte letter of October 15, 2002 from Whit Jordan, BellSouth to Marlene H. Dortch, attached presentation at 6; SBC Comments at 88.

[18] UNE Fact Report 2002 at section III-2.

user's loop terminates. WorldCom's presence in another wire center which it uses as a transport hub is completely irrelevant to the state of transport competition on the only route that matters – the one that reaches the end user that wishes to order WorldCom's services. Indeed, BellSouth would perversely punish CLECs for following a rational hubbing strategy by eliminating unbundled transport on the very routes where it would be most useful.[19]

## II. Special access pricing flexibility is irrelevant to impairment.

In an attempt to escape the granular impairment analysis mandated by the Court of Appeals, the BOCs have urged the Commission to eliminate unbundling of high-capacity circuits wherever they have obtained pricing flexibility for special access services.[20] This Commission must reject this brazen attempt to bootstrap pricing flexibility into an impairment finding to which the Commission has already determined that it does not apply.

To begin, the pricing flexibility triggers are irrelevant to the impairment analysis. As the Commission has previously found, satisfaction of pricing flexibility triggers "does not demonstrate that a requesting carrier is not impaired."[21] This is particularly true insofar as the Commission adheres to the mandate of the Court of Appeals and undertakes a granular impairment inquiry. The pricing flexibility triggers allow the BOCs to obtain pricing flexibility throughout an MSA based on the presence of a single fiber-based collocator in wire centers representing only 30% of special access revenues in that MSA. Anyone who has ever looked an actual map of CLEC fiber deployment in an MSA, knows that competitive fiber deployment is limited to a very small portion of the MSA.[22] The Commission cannot base its impairment finding for an entire MSA on the

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[19] Just as airlines use certain cities as "hubs" in which they aggregate traffic, competitive carriers such as WorldCom use particular ILEC wire centers as hubs. Circuits from multiple wire centers are aggregated in the hub location and allow the competitive carrier to achieve network efficiencies by using higher capacity transport links than could be justified if the circuits were not aggregated. It is important to recognize that the extension of fiber to the hub wire center does not necessarily make collocation in distant wire centers that utilize that hub more economical. Indeed, to some extent, the choice of one wire center as a fiber-based hub reduces the returns potentially available from collocating in another wire center.

[20] *See, e.g.*, ex parte letter of October 22, 2002 from W. Scott Randolph, Verizon, to Marlene H. Dortch.

[21] *UNE Remand Order*, n.673.

[22] For example, the Washington, DC MSA includes not only the District of Columbia but also: Calvert, Charles, Frederick, Montgomery, and Prince George's Counties in Maryland; Arlington, Clarke, Culpeper, Fairfax, Fauquier, King George, Loudoun, Prince William, Spotsylvania, Stafford, and Warren Counties, and Alexandria, Fairfax, Falls Church, Fredericksburg, Manassas, and Manassas Park Cities in Virginia, and Berkeley and Jefferson counties in West Virginia. CLEC deployment in parts of DC and suburban areas does not equate to the absence of impairment throughout this vast geographic area.

presence of competition along a tiny minority of transport routes within the MSA, unless it ignores the mandate of the Court of Appeals.

In addition, it appears that the pricing flexibility triggers do not actually work. That is, the Commission adopted its triggers based on the assumption that the BOCs would only obtain pricing flexibility in places where they faced substantial facilities-based competition that would constrain them from raising prices. Ironically, special access prices are now lower in many areas where the BOCs have not obtained pricing flexibility than in those areas where they have. As AT&T has recently shown, the BOCs are pricing special access at rates far in excess of economic cost.[23] Such pricing behavior reveals not the presence of competitive alternatives, but rather their absence.

## III. The BOCs' special access pricing behavior has significant implications for this proceeding.

For over three years, the BOCs have claimed that any requirement that they actually provide unbundled access to high-capacity loops, interoffice transport facilities, and EELs would have dire consequences for their revenues and the incentives of facilities-based competitors. While the Commission has never determined that any of these claims are well founded, it has delayed reaching a final decision on the BOCs' unbundling obligations based in part on the possibility that there might be some substance to the BOCs' allegations. WorldCom has compared special access and UNE prices for high-capacity circuits. That comparison shows that the differential between special access and UNE prices is driven almost entirely by mileage charges. As we show in what follows, that means that the BOCs have willfully gouged special access customers on the rate element that is least addressable by competitive providers. The Commission must consider the implications of this fact for the BOCs' claims.

The spreadsheet attached to this letter summarizes the pricing comparison that WorldCom undertook. That comparison consisted of an analysis of BOC UNE and special access prices in five states – California, Texas, New York, Illinois, and South Carolina. The analysis compares the most favorable special access prices available with UNE prices.[24] The analysis separately compares unbundled loop prices to special access channel termination prices, fixed UNE transport prices to fixed special access transport prices, and per-mile UNE transport prices to per-mile special access transport prices. The analysis also looks at prices for 5, 10, and 20-mile circuits under each of the pricing systems.[25] All of these comparisons are made for DS1 and DS3 circuits separately.

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[23] Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services (filed October 14, 2002).

[24] This is appropriate because CLECs offering competitive services know that they must compete against the lowest BOC prices available.

[25] To simplify the analysis, WorldCom assumed that all circuits terminated in collocation arrangements, but did not include pricing for cross-connects.

The analysis shows that DS1 loops are, on average, approximately 18% less than the comparable special access price. DS3 loops are approximately 28% less than special access. The fixed portion of DS1 UNE transport is approximately 10% less than the charge for special access. It is noteworthy that, for DS3s, the fixed special access charge is, on average, lower than the fixed UNE charge.

The real source of the overall difference between UNE and special access prices is found in variable mileage charges. The average per-mile charge for DS1 special access transport is $13.72, while the corresponding UNE charge is only $1.52 – a whopping 89% difference. The average per-mile charge for DS3 special access transport is $57.84, while the corresponding UNE charge is $23.35, which translates into a 60% difference.

As the spreadsheet shows, the disparity in mileage charges accounts for a huge portion of the overall difference between UNE and special access prices. For example, on a ten-mile DS1, 80% of the UNE/special access price difference arises from the variable, per-mile charges for transport. Even on a five-mile DS1, mileage charges account for 67% of the difference.

The Commission cannot ignore the implications of this analysis for its triennial review. The analysis makes plain that the BOC arguments as to why high-capacity circuits should not be unbundled, or should be unbundled only to provide local exchange services, are without merit.

Under price cap regulation, the BOCs have chosen to pursue a pricing strategy in which their customers pay outrageously high per-mile rates for transport, despite the fact that the rest of the telecommunications industry has long recognized that, once a network is built, transport costs are largely distance-insensitive. Indeed, it has been years since long distance companies removed all distance components from their pricing. The BOCs have adopted this strategy because, on the longer mileage routes where their pricing is most distorted, they face no competition whatsoever. The sunk costs of building competitive fiber to distant end offices constitute a nearly insuperable entry barrier for competitors.

Given these facts, BOC complaints about the potential impact of unbundling on their special access revenues should be ignored. That the BOCs have chosen to pursue a pricing strategy that insulates supra-economic profits from competitive loss, should be viewed as a problem to be solved by the use of UNEs, not as something to be protected.

This pricing strategy also makes it clear that a decision requiring the BOCs to provide unbundled access to high capacity loop and transport facilities will have virtually no effect on the incentives of facilities-based fiber providers. CLECs concentrate their fiber investment in the densest urban areas where mileage distances are shortest. Yet for low-mileage DS3s, the difference between UNE and special access prices is far smaller than for longer mileage routes. Indeed, in many cases the price of a zero-mile DS3 special access transport circuit is actually less than the corresponding UNE price. Unbundling of high-capacity circuits will have little impact on CLEC investment

incentives for the simple reason that the BOCs have concentrated the lion's share of their supra-competitive profits in routes where there is no evidence that CLECs can efficiently build competitive fiber networks.

## IV. Conclusion

In order to meet the mandate of the Court of Appeals, the Commission must require ILECs to provide unbundled access to high-capacity loop and transport elements whenever it is infeasible for a requesting carrier either to self-provision or obtain the needed element from a third party. Instead of providing the Commission with granular evidence of competitive deployment, the BOCs have filled the record with summary statistics of dubious value. But the record is absolutely clear that there are no competitive alternatives to BOC last-mile DS1s for nearly 90% of the relevant customer locations in the most competitive areas in the country. The BOCs' own data show that there are no competitive fiber providers in 86% of their wire centers.

Any use of the special access pricing flexibility triggers to limit ILEC unbundling obligations, would be plainly inconsistent with the Court of Appeals. Those triggers, which do not appear to function as intended, may allow the BOCs to obtain pricing flexibility throughout an MSA based on the presence of a competitor in a fraction of the wire centers. This is neither granular nor rational.

Finally, the BOCs have priced their special access services to include outrageously high per-mile charges for transport, despite the fact that the telecommunications industry has long recognized that transport costs are largely distance-insensitive. This practice effectively insulates a significant amount of BOC special access revenue from competitive loss. There is no evidence to suggest that facilities-based fiber providers can cost-effectively build to the distant wire centers that generate the longest mileage circuits. The Commission can ignore the effect of unbundling on the incentives of these providers, since the difference between special access and UNE prices is relatively modest for the routes on which they actually compete.

Sincerely,

/s/

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# ATTACHMENT – 5-STATE COMPARISON OF UNE & SPECIAL ACCESS PRICES